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Missouri Public Service Commission

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September 4, 1997

EX PARTE OR LATE FILED

William F. Caton
Secretary of the
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

VIA FEDERAL EXPRESS

DOCKET FILE COPY ORIGINAL

RE: CC Docket No. 97-166
Oral Ex Parte Presentations

Dear Mr. Caton:

Pursuant to the Public Notice released July 24, 1997, CC Docket No. 97-166 was designated as a "permit-but-disclose" proceeding and subject to the "permit-but-disclose" requirements under section 1.1206(b) of the Federal Communications Commission rules. 47 C.F.R. § 1.1206(b), as revised.

This notification is being made pursuant to section 1.1206(b) of oral ex parte presentations made by the Missouri Public Service Commission on September 3, 1997. Several presentations were held with the subject matter being substantively the same in each presentation. Those present during any of the subject presentations include the following: James Casserly, Commissioner Susan Ness, William Kennard, Richard Welsh, Lisa Sockett, Kyle Dixon, Richard Metzger, Blaise Sciento, Commissioner Rachelle Chong, Kathleen Franco, Tom Boasberg, and Paul Gallant. The presentations were made by Missouri Commissioner, M. Dianne Drainer, Penny G. Baker and Matt Kohly.

The presentations were limited to information related to events and filings at the State Commission level relating to the MCI arbitration. Specifically discussed, other than a reiteration of the filed response and attachments of the Missouri Commission in this case, were the requests for rehearing that have been filed at the Missouri Commission by Southwestern Bell Telephone Company ("SWBT"), MCI and AT&T

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Communications of the Southwest, Inc., the arbitration procedures that were followed by the Missouri Commission and a letter dated June 17, 1996 outlining those procedures, and notification of a limited testing (trial) of AT&T and SWBT for ordering resale services by a letter filed at the Missouri Commission on August 18, 1997.

The Missouri Commission representatives discussed the inconsistencies of the MCI Application for Rehearing, Reconsideration & Clarification of MCI filed at the Missouri Commission relating to the Final Arbitration Order and the MCI position in this FCC docket. In this FCC docket, MCI has asked the FCC to intercede pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, specifically asking the FCC to preempt the Missouri Commission's jurisdiction. In the Application for Rehearing filed at the Missouri Commission, MCI has asked the Missouri Commission to rescind its Final Arbitration Order and requested additional discovery, testimony and hearings.

Additional discussion centered around the arbitration procedures at the Missouri Commission. The Missouri Commission, by letter dated June 17, 1996, set forth its procedures to be followed in cases brought pursuant to Section 252 of the Telecommunications Act of 1996. A copy of that letter is attached hereto. MCI, SWBT and AT&T were provided an opportunity to respond to draft procedures prior to the June 17, 1996.

Questions from FCC personnel, other than a discussion of the Response and Attachments filed by the Missouri Commission, dealt with the question of what Issue No. 42 in the Missouri proceeding included and how that issue was handled in the Missouri Commission Order. Additionally, the Missouri Commission indicated that until the filing of the FCC Petition it was not aware of the list of items of allegedly undecided issues that MCI included in its Petition before the FCC. At no time prior to that filing was the Missouri Commission given a list of what MCI considered to be included in Issue No. 42.

Due to the voluminous nature of the SWBT Motion for Clarification, Modification and Application for Rehearing of Final Arbitration Order filed at the Missouri Commission and discussed above, the Missouri Commission has not faxed this letter and the attachments to it's Washington Counsel for filing today, but has sent by Federal Express this letter and all attachments for filing on September 5, 1997.

An original and one copy of this notification is being submitted to the Secretary of the FCC, as well as to each party to this docket and to the FCC Commissioners and employees who participated in these presentations via Federal Express. If you have further questions, please feel free to contact me.

Thank you for your attention to this matter.

Sincerely yours,

Penny G Baker

Penny G. Baker
Deputy General Counsel
573-751-6651
573-751-9285 (Fax)

PGB/sm
Enclosures
cc: Counsel of Record
James Casserly
Commissioner Susan Ness
William Kennard
Richard Welsh
Lisa Sockett
Kyle Dixon
Richard Metzger
Blaise Sciento
Commissioner Rachelle Chong
Kathleen Franco
Tom Boasberg
Paul Gallant

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June 17, 1996

To Whom It May Concern:

The Commission has adopted procedures for the arbitration of interconnection agreements under the federal Telecommunications Act of 1996. These procedures are enclosed for your information. The procedures will provide companies negotiating interconnection agreements the information necessary to request arbitration with the Missouri Public Service Commission, and information on how the arbitration process will be conducted. The Commission has reserved some of the specific issues, such as intervention and discovery, until it has a specific case situation in which to address those questions.

If any person has questions concerning these procedures, feel free to contact the Chief Administrative Law Judge, Cecil Wright, at (573) 751-7497.

Very truly yours,

David L. Rauch
Executive Secretary

DLR:CIW:jp

Enclosure

Missouri Public Service Commission

POST OFFICE BOX 360
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Arbitration Procedures

Under the Telecommunications Act of 1996 ("the Act"), Section 252, the Missouri Public Service Commission ("the Commission") is authorized to arbitrate disputes between companies concerning interconnection agreements, services and network elements. The Commission also has authority to arbitrate controversies between regulated utilities under Missouri law. Section 386.230, RSMo 1994. The Act provides for the resolution of issues through compulsory arbitration. Between the 135th and 160th day after negotiations begin between the parties, either party may petition the Commission to arbitrate the remaining unresolved issues. The arbitration described here pertains to the arbitration of interconnection agreements, services and network elements, as required by the Act.

The arbitration process is initiated by a party by filing a petition for arbitration with the Commission. The petitioning party should attach to its petition:

(1) relevant documentation concerning the unresolved issues;

(2) relevant documentation concerning the position of each of the parties with respect to the unresolved issues;

(3) relevant documentation concerning any other issue discussed and resolved by the parties; and

(4) any other information the petitioning party believes the Commission may require in making its decision.

Copies of all petitions and documents are to be served on the nonpetitioning party and the Office of the Public Counsel (OPC) on the same day they are filed with the Commission. The Commission Staff and OPC are bound by the provisions of Section 386.480, RSMo 1994, with regard to the information obtained through this arbitration process.

When an arbitration petition is received, the Commission will assign the petition a case number, and will send notice to the nonpetitioning party that arbitration has been requested. The nonpetitioning party has 25 days from the date on which the Commission receives the petition to file a response to the petition and to file whatever additional information it wishes. Confidential information should be filed pursuant to the Commission's standard protective order, which will be adopted for the case.

Although the Commission has the authority under the Act to request whatever information it deems necessary for it to make its decision, parties are encouraged to err on the side of providing too much information rather than too little. Because there is a very short time within which the Commission must render a decision, requests for information to the parties from the Commission will include a response date. If parties fail to respond in a timely manner, the Commission will, under the Act, be forced to decide the issues upon the best information available to it from whatever source derived.

The arbitration will be conducted by an ALJ under procedures similar to current contested case procedures. Whether additional discovery or intervention is allowed will be determined on a case-by-case basis. A scheduling conference will be held for the purpose of establishing a procedural schedule. The procedural schedule will include dates for: (1) parties' filing of additional information; (2) the ALJ's or Commissioners' request(s) for additional information; (3) responses to the ALJs' and Commissioners' data requests; (4) a hearing; (5) briefing if necessary; and (6) the order to be issued.

Since this process must be completed by the 270th day after negotiations are requested, the hearing date will be set no later than the 210th day. The parties will be served with a copy of the written decision by the 270th day. If the parties accept the Commission decision, they will incorporate the decision into an interconnection agreement to be filed with the Commission. If a party does not agree with the decision, it may appeal to an appropriate federal district court.

The Commission will transcribe the arbitration hearing. Commission Staff will be utilized in an advisory role to the Commission and will not participate as a party in the arbitration. Those Staff members who act as advisors to the Commission in an arbitration proceeding will be subject to the same *ex parte* restrictions as Commissioners and ALJs.

Dated at Jefferson City, Missouri,
on this 17th day of June, 1996.

Diana J. Harter
Attorney
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Southwestern Bell

FILED

AUG 18 1997

MISSOURI
PUBLIC SERVICE COMMISSION

August 12, 1997

Mr. Cecil I. Wright
Executive Secretary
Missouri Public Service Commission
301 West High Street, Suite 530
Jefferson City, MO 65101

Re: Case No. TO-97-40

Dear Mr. Wright:

The purpose of this letter is notify you that AT&T and Southwestern Bell Telephone Company (SWBT) have preliminarily agreed to work together to implement limited testing for ordering resale services in a mutually agreeable manner, prior to Commission approval of our Agreement for Interconnection and Resale. SWBT and AT&T plan to work out the details and begin such testing by August 19.

The trial will be limited to approximately 50 resold lines with the trial focus on the effectiveness on the two companies' electronic interfaces and ordering systems. There will be no service provided to the public prior to Commission approval of our Agreement. For the purposes of this trial, AT&T will not be offering service for hire nor billing for this service prior to Commission approval of our Agreement. Further details will be worked out shortly.

By agreeing to the trial, neither party waives any arguments or positions that the party may be taking in any pending judicial or regulatory proceeding. Unless informed by the Commission otherwise, we will proceed with the trial between SWBT and AT&T.

Sincerely,

Diana J. Harter
Attorney for
Southwestern Bell Telephone Company

Paul S. DeFord
Attorney for
AT&T Communications of the Southwest, Inc.

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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of AT&T Communications of the Southwest, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company.	)	Case No. TO-97-40
Petition of MCI Telecommunications Corporation and its Affiliates, Including MCImetro Access Transmission Services, Inc., for Arbitration and Mediation Under the Federal Telecommunications Act of 1996 of Unresolved Interconnection Issues with Southwestern Bell Telephone Company.	)	Case No. TO-97-67

FILED
AUG 1 9 1997
PUBLIC SERVICE COMMISSION

APPLICATION FOR REHEARING, RECONSIDERATION AND CLARIFICATION OF MCI TELECOMMUNICATIONS CORPORATION, MCImetro ACCESS TRANSMISSION SERVICES, INC., AND AFFILIATES

COME NOW MCI Telecommunications Corporation, MCImetro Access Transmission Services, Inc and affiliates (collectively MCI) pursuant to the Commission's Final Arbitration Order of July 31, 1997, and for their Application for Rehearing, Reconsideration and Clarification state to the Commission as follows:

Introduction

The Commission has failed to resolve this arbitration proceeding in its "Final Arbitration Order". By rejecting the interconnection agreement submitted by MCI, the Commission has left the parties where it found them, at loggerheads over key disputed sections. In this respect, the Commission has totally ignored its duty to resolve such disputes. By rendering a "final" decision on interconnection rates without holding a hearing, the Commission has excluded the parties from the consideration of this critical aspect of interconnection. In this respect, the Commission has ignored its duty to resolve that issue by arbitration rather than fiat. For these reasons, the Commission should

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rescind its Final Arbitration Order, reinstate the interim rates pending discovery and a hearing regarding the Staff's recommendations and the parties positions on permanent rates, and grant MCI's Motion for Approval of Interconnection Agreement subject to future replacement of interim rates with permanent rates.

Interconnection Agreement

The Commission should rescind its rejection of the interconnection agreement filed by MCI on or about June 16, 1997, and rescind its denial of MCI's Motion for Approval of that agreement. Such action constitutes a continuing failure on the part of the Commission to complete this arbitration as required by section 252 of the Telecommunications Act of 1996. MCI needs a complete interconnection agreement to enter the local exchange market in Missouri. It has not been able to reach such an agreement with SWBT. By continuing in its failure to address the unresolved aspects of an interconnection agreement, the Commission deprives MCI of the arbitration remedy to which it is entitled under the Act for SWBT's refusal to voluntarily enter into a full agreement and thereby effectively precludes MCI from market entry.

MCI sought arbitration on all aspects of an interconnection agreement in compliance with section 252(b)(2), as set forth in its Petition for Arbitration and documented by the accompanying Term Sheet. MCI provided evidence regarding such matters at the hearing on issue 42 through the testimony of witness Russell including the interconnection agreement which was a part of her testimony. SWBT declined to provide any evidence on the other terms of interconnection. In its briefs, MCI urged the Commission to approve the proposed contract subject to reconciliation with the other aspects of the Commission's arbitration decision. The Commission refused to address this issue in its Arbitration Order.

Instead of arbitrating issues squarely presented to it, the Commission directed MCI to negotiate such provisions with SWBT. MCI repeatedly asked the Commission to at least provide help in the form of a deadline to complete such negotiations. The Commission simply ignored these requests. MCI took post-arbitration negotiations as far as it could with SWBT, but ultimately came to a point where it could not reach further agreement with SWBT. MCI then submitted the interconnection agreement on June 16, 1997.

As reflected in the matrix which MCI filed with its Reply to SWBT's motion to strike the submitted agreement, numerous critical aspects of interconnection remain in dispute. MCI did its best to resolve all these issues with SWBT, but the unequal bargaining positions of the companies which necessarily has always attended this process left MCI in the position of either capitulating to SWBT on critical issues or turning back again to the Commission for relief. As demonstrated by the matrix, MCI really had no choice at all, because by capitulating MCI would have effectively left itself unable to do business.

Nonetheless, in submitting the agreement for Commission approval, in good faith MCI did not simply revert back to its original negotiating positions on unresolved issues, but rather submitted the modified language which had been generated in its efforts to reach agreement with SWBT (i.e. language more acceptable to SWBT). MCI was certain that the Commission would expect it not to backtrack but rather present remaining issues as currently framed by the parties, so as to minimize the scope of the dispute. But even with the issues thus focused as much as possible, the Commission ignored its duty to arbitrate and refused to resolve them. Instead, it rejected the proposed agreement outright, leaving MCI still without an interconnection agreement some 17 months after requesting interconnection from SWBT.

While the Commission appears to have now ordered SWBT to negotiate further with MCI and to reach agreement by September 30, 1997, there is little prospect of such negotiations taking place, let alone being productive. MCI was not able to get SWBT even to begin the negotiations after the first arbitration order until over two months elapsed. Further, MCI and SWBT have already been unable to resolve the remaining issues despite substantial negotiations. Hence, in all likelihood MCI will be compelled to re-submit the same interconnection agreement on September 30, 1997, and will have gained nothing and lost yet another two months in its efforts to enter the Missouri local exchange market.

Notwithstanding the Commission's apparent lack of desire to address the remaining details of the agreement, such details will remain critical and MCI will have no choice but to re-submit them for decision. Rather than requiring MCI to pursue futile meetings with SWBT and lose additional precious time, the Commission should rescind its rejection of the interconnection agreement submitted by MCI, rescind its denial of MCI's Motion for Approval, and issue its order granting the relief sought in that motion subject to reconciliation with the ultimate permanent rates.

Rates

The Commission should rescind its decision on the permanent rates described in its Final Arbitration Order and reinstate the interim rates pending a proceeding during which MCI would be afforded a full and fair opportunity to conduct discovery and be heard. The procedures followed by the Commission since it rendered its Arbitration Order have violated MCI's due process rights and have deprived it of notice and an opportunity to be heard on the crucial issue of the rates it must pay for interconnection and resale. The Commission has made its decision based on information delivered to it on an ex parte basis which has yet to even be fully disclosed to MCI. Further, the Commission has denied MCI the opportunity to confront this information, submit it to expert analysis, test it by cross-examination, and rebut it. The Commission cannot lawfully resolve such a critical aspect of interconnection with such blatant disregard for MCI's right to be heard.

MCI continues to urge the Commission to base its decision regarding permanent interconnection rates on the Hatfield model for all the reasons adduced in the record and the briefs during the arbitration hearing. The Commission has now rejected improved versions of the Hatfield model based on an ex parte Staff recommendation. The criticisms which are disclosed in the Staff report are inaccurate and invalid. Thus far, MCI has not been afforded an opportunity to discover the full extent of the criticisms, test them before the Commission by cross-examination, or offer rebuttal evidence. The Commission has in essence rejected new versions of the Hatfield model arbitrarily, for conclusions reached through this ex parte process are entitled to no more weight than an outright refusal to even consider the model. Hence, the Commission should set a procedural schedule which affords MCI the opportunity to conduct discovery to learn the full extent of the Staff's understanding and criticisms and then to test and rebut those criticisms at an evidentiary hearing.

Moreover, the Commission should afford MCI a full and fair opportunity to be heard on the issues surrounding SWBT's cost studies. MCI has not even been allowed to see the studies upon which the Commission has based its "final" decision. It has had no chance to evaluate those studies and the Staff's adjustments thereto, nor to test either the studies or the adjustments by cross-examination, nor to rebut them with opposing evidence. Again, the Commission has made an arbitrary decision based on ex parte information in violation of MCI's due process rights.

As pointed out in MCI's Joint Application for Rehearing filed February 3, 1997, under the Federal Arbitration Act, the Missouri Arbitration statutes, and the Commission's own arbitration statute and rules, it is clear that any decision in this case must be based upon a record developed after notice and a full and fair hearing on the merits. The federal courts have made it clear that an arbitration under the Federal Arbitration Act, Title 9 of the US Code, must afford the parties a full and fair hearing. See, e.g., Konkar Maritime Enterprises, SA v. Compagnie Belge D'Affretement, 668 F Supp 267 (SDNY 1987); Petrol Corp v. Groupement D'Achat Des Carburents, 84 F Supp 446 (DCNY 1949). Further, the federal courts have prohibited ex parte contacts between parties and arbitrators. See, e.g., Totem Marine Tug & Barge, Inc. v. North American Towing, Inc., 607 F2d 649 (CA La. 1979); Chevron Transport Corp v. Astro Venceder Companese Navien, 300 F Supp 179 (DCNY 1969). Chapter 435 of the Missouri statutes likewise requires notice and hearing. See, e.g., Sections 435.370, 435.405. Similarly, the Commission's arbitration statute and rules require notice and hearing, see section 386.230 and June 17, 1996 arbitration procedures, as do its general procedural statutes and rules, see section 386.420 and 4 CSR 240-2.110 & 4.020.[1]

The Commission has blatantly violated the fundamental requirements of due process. Consequently, it must rescind its Final Arbitration Order, reinstate the interim rates, and set a full procedural schedule for consideration of the Staff's recommendations and the alternative views of

[1] The Commission cannot justify its refusal to hold a hearing by pointing to section 252(b)(4)(B), as it has never afforded MCI a hearing regarding the permanent rates. It has only subjected MCI to an investigation, with which MCI cooperated fully.

the parties. See, e.g., State ex rel Fischer v. PSC, 645 SW2d 39, 42 (Mo App 1982)(requiring scope of hearing to encompass positions of all parties).

It has been impossible for MCI to assess the Staff's recommendations when it has been denied access to the underlying cost studies and deprived of the opportunity to question the Staff about its report. For example, MCI is unable to discern the results of the common cost analysis (Report, p. 125). However, with the limited information made available to date, MCI has been able to identify on a preliminary basis a number of substantive errors in the Staff's report, as follows:

> A. Recovery of income taxes is properly covered by the rate of return, and the apparent allowance of income taxes as a cost element improperly allows double recovery, artificially inflating the rates to a non-competitive level. See Concurring Opinion of Chairman Zobrist.
>
> B. Exclusion of the income tax credit amortization artificially inflates SWBT's costs even beyond the error identified in point A above. (Report, p 115) If taxes are to be doubly recovered, at the least the second recovery should be held to the actual amount. When the amortization expires, rates can be changed as appropriate.
>
> C. Staff's rejection of inflation and productivity factors is based on the patently unsupported and inaccurate conclusion that such factors simply offset one another. (Report, p 5). The FCC has consistently used both factors, without the result being a wash. See Price Cap Fourth Further NPRM, CC-94-1. The Missouri Legislature has also concluded that such factors are not simply offsets, calling for the use of both under the price cap statute (section 392.245).
>
> D. The Staff has recommended the use of depreciation projection lives which are too short and artificially increase costs. (Report, p. 97 et seq.). Staff inappropriately used financial reporting depreciation rates of CAPs, CATV, CMRS and IXCs as benchmarks. These rates overstate expense because of their conservative financial origin and are improperly drawn from companies that have not invested in ubiquitous local exchange services. Use of such short rates will serve only to unlawfully cross-subsidize SWBT's ventures into other markets by supporting premature network replacement. Use of such short rates would also be unlawfully discriminatory, as CLEC customers served by UNEs would in effect be providing capital recovery for SWBT at nearly twice the rate of SWBT's customers. The Commission should utilize the FCC projection lives, which are still substantially shorter than actual lives, as shown below:

	Latest Life Indication	FCC Projection Life	Staff Projection Life
Digital Switching	56.2	16.0	9.4
Digital Circuit	15.8	11.0	7.0
Aerial Cable	35.0	25.0	13.7
Underground Metallic	56.8	25.0	15.0
Buried Metallic	32.0	20.0	16.3

E. It is not clear, but it appears the Staff has accepted an extremely high loop fiber/copper cross-over point of 15 kft, when it should be no higher than 12 kft, and preferably at 9 kft. (Report, p. 20-21).

F. The Resale Avoided Cost Study understates the avoidable percentage of product management costs, which should be 90% as indicated by the FCC and the testimony of Randy Klaus, not merely 50% as half-heartedly proposed by Staff (Report, p. 180). A correction by the Commission of this error would according to Staff increase the general discount rate by .34. (Id). The same adjustment should be made to the separate operator services discount, in the amount of .30. Staff's "shared benefit/shared cost" analysis has no place in an avoidable cost analysis, as Staff itself recognizes in its Report. (Id.).

G. The aggregate discount should be increased, because the denominator in the calculation should be reduced by removing operator services revenues. With the separate operator services discount, and the accompanying general assumption that such service will not be resold, such revenues do not belong in the denominator according to Staff's express methodology. (Report. p. 184).

H. The Staff identified numerous areas of concern, yet made no adjustments to address its concerns. For example, the Staff acknowledges SWBT overstates investment by failing to take into account the tapering of feeder cables, and by failing to differentiate between loop cable type distribution percentages, but Staff does nothing about these failings. (Report, p. 18, 19, 25). Likewise, Staff identified that SWBT was not including vendor discounts for engineering and installation of switches, but did not make an adjustment. (Report, p. 32).

I. Staff recommends that NRCs be set at 50% of SWBT's proposed rates, but there is no indication that the Commission followed this recommendation. If it did not, it should correct its decision. Further, Staff recommends that SWBT present additional information (Time and Motion studies) to further refine these rates, but no process is established for review of such information.

In large part, MCI cannot quantify any of the foregoing items, again because it has been denied access to the underlying information. Nonetheless, the foregoing examples show that a hearing on permanent rates would be substantively productive.

To correct the substantial defects in the procedures used since the issuance of the initial arbitration order, the Commission should rescind the permanent rates, reinstate the interim rates, and conduct a proper hearing concerning Staff's report and the parties' positions on permanent rates.

Conclusion

As explained above, the Commission has not moved this case any closer to conclusion by issuing its "Final Arbitration Order". Instead, the Commission has abdicated its responsibilities as arbitrator under the Telecommunications Act of 1996. It has refused to resolve the remaining disputed provisions of an interconnection agreement between MCI and SWBT. It has refused to arbitrate permanent rates, declaring them by fiat without notice and hearing contrary to the fundamental requirements of due process. To move forward, the Commission must now take a step back. It must rescind its "Final Arbitration Order", approve MCI's proposed interconnection agreement, reinstate the interim rates, and hold a proper hearing on permanent rates. Such action is mandated by the provisions of the Telecommunications Act and by long-established principles of due process.

Respectfully Submitted,

CURTIS, OETTING, HEINZ,
GARRETT & SOULE, P.C.

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Attorneys for MCI Telecommunications Corporation and
MCImetro Access Transmission Services, Inc. and affiliates

Certificate of Service

A true and correct copy of the foregoing was mailed this 19 day of August, 1997, by placing same in the U.S. Mail, postage paid to the persons listed on the attached list.

Paul G. Lane
Diana J. Harter
Leo Bub
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Michael F. Dandino
Senior Public Counsel
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Paul DeFord
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2345 Grand Blvd.
Kansas City, Missouri 64108-2684

PB
SD

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of AT&T Communications of the Southwest, Inc.'s Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company.	**)**	**Case No. TO-97-40**
In the Matter of Petition of MCI Telecommunications Corporation and its Affiliates, Including MCImetro Access Transmission Services, Inc. for Arbitration and Mediation Under the Federal Telecommunications Act of 1996 of Unresolved Interconnection Issues with Southwestern Bell Telephone Company.	**)**	**Case No. TO-97-67**

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.'S
APPLICATION FOR REHEARING OR RECONSIDERATION

COMES NOW AT&T Communications of the Southwest, Inc. (AT&T) and for its Application for Rehearing or Reconsideration states as follows:

1. AT&T has reviewed the permanent rates established by the Commission's July 31, 1997 Final Arbitration Order. AT&T appreciates the time and effort the Commission and its Advisory Staff have devoted to investigating, analyzing and developing the aforementioned permanent rates.

2. There is one area where the permanent rates established by the Commission are apparently based upon erroneous information. The specific area of concern involves the Staff's recommendation regarding the appropriate depreciation lives for use in TELRIC calculations. The Staff's analysis and recommendation are deficient in the following respects:

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A. Staff Benchmarks are Inappropriate

Staff went to great effort to develop benchmarks based upon the depreciation rates used for financial reporting purposes by CAPs, CATV companies, CMRS providers and IXCs (see DMB-5). There are three major reasons why these benchmarks are inappropriate for use in TELRIC proceedings.

(1) GAAP is conservatively biased.

The lives used for financial accounting purposes are governed by the Generally Accepted Accounting Principle ("GAAP") of "conservatism." As the FCC has found, GAAP is investor-focused, and may not serve the interest of ratepayers. The FCC states:

> One of the primary purposes of GAAP is to ensure that a company does not present a misleading picture of its financial condition and operating results by, for example, overstating its asset values or overstating its earnings, which would mislead current and potential investors. GAAP is guided by the conservatism principle which holds, for example, that, when alternative expense amounts are acceptable, the alternative having the least favorable effect on net income should be used. Although conservatism is effective in protecting the interest of investors, it may not always serve the interest of ratepayers. Conservatism could be used under GAAP, for example, to justify additional (but, perhaps not "reasonable") depreciation expense by a LEC to avoid its sharing obligation. Thus, GAAP would not effectively limit the opportunity to LECs to manage earnings so as to avoid the sharing zone as the basic factor range option. In this instance, GAAP does not offer adequate protection for ratepayers.[1]

[1] Prescription Simplification, Report and Order, FCC 93-452, released October 20, 1993, para. 46.

(2) Other industry comparisons are inappropriate.

None of the benchmark carriers have significant investments in the provision of ubiquitous local exchange services. The use of plant to provide narrowband local loops and end office switching is unique to the LEC industry. On page 104 of its recommendation, Staff states the IXC rates are "most significant," but IXCs have no local loops or end office switches.[2] While Staff downplays this difference on page 107, the fact remains that the FCC staff prescribed much shorter lives for AT&T than for LECs as recently as 1994.

(3) TELRIC lives must not reflect premature retirements.

While it may be appropriate to shorten lives on the financial books of a LED to reflect their intent to replace their networks with new ones capable of providing nonregulated video services, such an assumption is not appropriate in setting TELRIC lives. Such life shortening, and expense increasing, actions would provide a direct cross-subsidy to LEC video ventures. This would be contrary to the 1998 Act and the FCC's rules.

B. FCC Benchmarks Are Appropriate

On page 101, Staff cautions the Commission to recognize that the life ranges prescribed by the FCC do not represent true mortality experience. That is exactly the point. Since 1980, the FCC has prescribed forward-looking lives which are shorter than

[2] All references are to page from the Advisory Staff Report attached to the Commission's July 31, 1997 Order as Attachment C.

historical life indications, as the following table dramatically illustrates:

	Latest Life Indication (a)	FCC Projection Life (b)	Staff Projection Life (c)
Digital Switching	56.2	16	9.4
Digital Circuit	15.8	11	7
Aerial Cable	35	25	13.7
Underground Metallic	56.8	25	15
Buried Metallic	32	20	16.3

Source: Col. (a) = 12/20/94 SWBT Depreciation Study
Col. (b) = DMB-4
Col. (c) = DMB-4

Staff has ignored the fact that FCC lives have already been shortened as compared to historical life indications to reflect economic obsolescence, technological developments and competition. To reduce the FCC prescribed lives even further is totally inappropriate.

(C) Staff Lives Are Discriminatory

The acceptance of Staff lives for the pricing of unbundled network elements which are so divergent from FCC/PSC prescribed lives would clearly be anti-competitive and discriminatory. The higher prices resulting from these lives would discourage the purchase of unbundled network elements by CLECs. In effect, the customers of CLECs would be providing capital recovery in some accounts at nearly twice the rate of LEC customers. This would not only be discriminatory, it would also effectively represent a capital contribution by CLEC customers to SWBT.

The FCC recently decried the use of discriminatory depreciation rates in its Price Cap/Access Reform Order.[3] The FCC decided to use its prescribed depreciation rates in determining the price cap X-Factor.[4] It found that commenters had not persuaded it that the depreciation rates it has currently prescribed do not reflect LEC depreciation costs.[5] The FCC added:

> We can think of no reason why incumbent LECs should be permitted to use different depreciation rates for different regulatory purposes.[6]

(D) TELRIC Assumes a Narrowband Network

On page 105, Staff states that it does not believe it was the intention of the FCC to have the state Commissions' set prices on a network designed to provide only dial tone and voice services (i.e., - a narrowband network). But that is exactly what the FCC did intend for the pricing of unbundled network elements. The models designed by all parties to calculate TELRIC focus on only narrowband services to ensure that the costs developed do not exceed the standalone cost of each narrowband network element. Of course, to the extent that economics of scale exist, a LEC will be able to profit from the provision of other services.

3. AT&T urges the Commission to reconsider the depreciation lives to be

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[3] Price Cap Performance Review for Local Exchange Carrier, CC Docket No. 94-1 (Fourth Report and Order), Access Charge Reform, CC Docket No. 96-262 (Second Report and Order), FCC 97-159, released May 21, 1997.

[4] Id., para. 63.

[5] Id.

[6] Id., footnote 122.

utilized in setting permanent rates. As demonstrated, the premises upon which the Advisory Staff based its recommendation are fundamentally flawed and lead to the imposition of excessively high rates. Adjustment of depreciation lives to appropriate levels will have a significant effect on the level of permanent rates, and make the Missouri decision consistent with the vast majority of jurisdictions which have addressed this issue.[7] Attached hereto as Appendix A is a table which illustrates the projected life comparisons for various SWBT accounts.

4. AT&T seeks clarification of the applicability of the "customer change charge". The July 31 Order affirms that the charge shall be $5.00 for customer conversion to CLECs and that no additional charge, other than service order charges, will be applicable. It is AT&T's understanding that the customer change charge will apply to both conversions of total service resale customers and unbundled network element customers. AT&T believes this to be a logical interpretation of the Arbitration Orders and requests that the Commission confirm the applicability of the conversion charge to each circumstance.

5. AT&T also requests that the Commission clarify that until such time as it has had an opportunity to reconsider and revise the permanent rates set in its July 31, 1997 Order, the previously established interim rates shall be utilized. The interim rates are based upon competent and substantial evidence developed during the initial

[7] Depreciation lives prescribed by the FCC or relevant State Commission have already been approved in TELRIC proceedings in the following jurisdictions: Massachusetts Docket No. DPU 96-73/74, et al. December 4, 1996; New York Docket No. 95-C-0657, et al. April 1, 1997; West Virginia Docket No. 96-1516-T-PC April 21, 1997; Wyoming Docket No. 70000-TF-96-319 April 23, 1997; Delaware Docket No. 96-324 April 29, 1997; Ohio Docket No. 96-922-TP-UNC June 19, 1997; Michigan Docket No. U11280 July 14, 1997; Colorado Docket No. 96S-331T July 28, 1997; and Proposed Order Illinois Docket No. 96-0486 et al. August 8, 1997.

arbitration process and should remain in place until they are finally and properly replaced. Use of the interim rates will permit market entry in the time frame contemplated in the Commission's July 31, 1997 Order and permit the Commission to take the time necessary to reconsider and revise the permanent rates. Once properly approved rates are developed, they may be substituted to replace the interim rates in interconnection agreements between the parties.

6. AT&T remains extremely concerned that despite its best efforts, the Commission's Final Arbitration Order will not result in a timely, approved, comprehensive interconnection agreement. Specifically, based upon experience in other jurisdictions, AT&T expects that there will be a number of areas where the parties are generally in agreement or the Commission has resolved issues and provided some guidance, but mutually acceptable implementing language cannot be agreed upon. AT&T requests that the Commission clarify that in such circumstances, each party will submit proposed language and the Commission will select which provision shall be included in the interconnection agreement. Only by taking such decisive action will the Commission be in a position to review and approve comprehensive, functional interconnection agreements.

WHEREFORE, for all of the foregoing reasons, AT&T requests that the Commission reconsider and clarify its Final Arbitration Order of July 31, 1997.

Respectfully submitted,

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